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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. [redacted] /5 0

THOMAS E. SNYDER SONS CO.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner petitions that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit entered in the above case, reported in 288 F. 2d 36, (App. p. 1) on March 17, 1961, (App. 10) affirming a decision of the Tax Court published in 34 TC 400. (R. p. 41). The jurisdiction of this Court is invoked under 28 USC 1254(1), 62 Stat. 928.

QUESTIONS PRESENTED

Was the court below correct in stating that Section 129 of the Internal Revenue Code of 1939 and Section 269 of the Internal Revenue Code of 1954 denied petitioner the right to carry forward a net operating loss deduction because:

1. Petitioner itself suffered the loss and there was no benefit acquired when control of petitioner was acquired.

2. Since first two brothers controlled petitioner and then one of them, there was no acquisition of control within the meaning of the statute.

3. Since one individual owned stock in petitioner at all times, the respondent erred in not allowing a portion of the net operating loss deduction.

STATUTES INVOLVED

Section 129 (a) and (b) of the Internal Revenue Code of 1939 and Section 269 (a) and (b) of the Internal Revenue Code of 1954. Appendix C, App. 11.

STATEMENT OF THE CASE.

Petitioner was organized March 3, 1949, to develop and market corn pickers and other agricultural machinery. Benjamin A. Snyder and his brother, Warren P. Snyder, each acquired for $62,500 cash, at incorporation, 625 shares of the 1,795 shares issued by petitioner. From March 3, 1949 until September 30, 1953, they together at all times owned over 50% of the outstanding stock of petitioner. During this period, petitioner suffered losses and by September 30, 1953, had more liabilities than assets and was out of the farm machinery business.

Warren P. Snyder sold his brother, Benjamin, his 625 shares of stock on September 1, 1953, for $125. Benjamin A. Snyder also acquired the other 545 shares of petitioner for $109.

Benjamin Snyder on September 1, 1953 transferred 45 tank cars to petitioner in return for petitioner's note and petitioner operated the tank cars.

On March 1, 1954, Thomas E. Snyder Sons Co. (wholly owned by Benjamin A. Snyder) was merged into petitioner and petitioner's name was changed to Thomas E. Snyder Sons Co.

Petitioner's operation of tank cars in its fiscal year ended February 28, 1954, was profitable and its operation of tank cars and in the molasses business during its fiscal years ended February 29, 1956, were also profitable.

The Tax Court disallowed a deduction in the profitable years of a net operating deduction which arose from losses by petitioner in previous years. This disallowance was erroneously affirmed by the court below.

REASONS FOR GRANTING THE WRIT

This case involves an important point of income tax law which this Court specifically stated it was not deciding in a footnote (No. 9, 353 US 390) to its opinion in *Libson Shops* v. *Koehler*, 353 US 382.

This Court should grant certiorari and hear this case in order to prevent the multiplicity of litigation necessary to have this point decided by all of the United States Courts of Appeal.

Petitioner is aware that since this Court's opinion in the *Libson Shops* case, three circuits have decided the issue adversely to petitioner but there are many Circuit Courts of Appeal yet to be heard from.

Until this issue is either decided by this Court or adversely by all the Circuit Courts of Appeal, the petitioner is compelled to take every step possible to preserve its rights in the event a subsequent conflict develops. *United States* v. *The Ohio Power Co.*, Cert. denied, 350 US 862, 76 S. Ct. 104, 100 L. Ed. 761, Oct. 17, 1955; Rehearing denied 350 US 919, 76 S. Ct. 192, 100 L. Ed. 805, Dec. 5, 1955; Second Rehearing denied, 351 US 958, 76 S. Ct. 853, 100 L. Ed. 1480, May 28, 1956; Order denying rehearing vacated and rehearing continued, 351 US 980, 76 S. Ct. 1043, 100 L. Ed. 1495, June 11, 1956.

The two other issues in this case have never been passed upon in any other case. The facts of this case being somewhat unusual in that the stockholder who owned petitioner in the profitable years was one of two brothers who were original investors in petitioner and who together and separately at all times controlled it. It is doubtful that many such cases could arise. However, if they do, it may well be that a conflict will arise and, as stated above, petitioner must protect and preserve its rights should such event occur.

ARGUMENT.

Section 129(a) of the Internal Revenue Code of 1939 (Section 269 of the Internal Revenue Code of 1954 is similar) states:

> "Disallowance of Deduction, Credit, or Allowance.—If (1) any person or persons acquire, on or after October 8, 1940, directly or indirectly, control of a corporation, or (2) any corporation acquires, on or after October 8, 1940, directly or indirectly, property of another corporation, not controlled, directly or indirectly, immediately prior to such acquisition, by such acquiring corporation or its stockholders, the basis of which property, in the hands of the acquiring corporation, is determined by reference to the basis in the hands of the transferor corporation, and the principal purpose for which such acquisition was made is evasion or avoidance of Federal income or excess profits tax by securing the benefit of a deduction, credit, or other allowance which such person or corporation would not otherwise enjoy, then such deduction, credit, or other allowance shall not be allowed. For the purposes of clauses (1) and (2), control means the ownership of stock possessing at least 50 per centum of the total combined voting power of all classes of stock entitled to vote or at least 50 per centum of the total value of shares of all classes of stock of the corporation."

Thus the statute to be applicable requires:

1. Control be acquired.

2. The principal purpose of such acquisition must be evasion or avoidance of Federal income or excess profits tax.

3. There must be secured the benefit of a deduction, credit or other allowance which such person or corporation would not otherwise enjoy.

In this case it was stipulated that net operating loss deduction in question was available to petitioner and hence, there was no deduction secured which was not already present. That this, which formerly was the position taken by the Tax Court and acquiesced in by respondent, (which acquiescence was still in force at the time Benjamin A. Snyder acquired 100% of petitioner's stock) was and is still the law, is demonstrated by the fact that Congress in the Internal Revenue Code enacted Section 129 of the 1939 Code into law as Section 269 while adding Sections 381 and 382 to specifically cover such transactions. Sections 381 and 382 of the 1954 Code are meaningless if the interpretation placed on the language of Section 129 of the 1939 Code is also applicable under the identical language when contained in Section 269 of the 1954 Code. To hold otherwise is to hold that identical language in the Internal Revenue Codes of 1939 and 1954 have two different meanings.

The respondent acquiesced to the decision of the Tax Court in *A. B. & Container Corp.* (14 TC 842) at CB 1950—2p1 and *Wage, Inc.* (19 TC 249) at CB 1954—2p6.

This Court stated it has not passed on the situation here present. It should do so now.

It is respectfully submitted that the writ of certiorari should issue.

JOHN W. HUGHES
HAROLD R. BURNSTEIN
Counsel for Petitioner

June 17, 1961

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1960, JANUARY SESSION, 1961

No. 13159

THOMAS E. SNYDER SONS CO., *Petitioner*,
v.
COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

Petition for Review of Decision of the Tax Court of the United States.

March 17, 1961

Before HASTINGS, *Chief Judge*, KNOCH and MAJOR, *Circuit Judges*.

MAJOR, *Circuit Judge*. This is a petition for review of a decision of the Tax Court of the United States, sustaining deficiencies in income tax for the fiscal years ending February 28, 1954, 1955, and 1956, assessed against petitioner by respondent. Petitioner was organized on March 3, 1949, as Great American Farm Implement Corporation. At the time of its incorporation, 1795 shares of stock were issued, of which Benjamin A. Snyder and his brother, Warren P. Snyder, each acquired 625 shares, for which they respectively paid $62,500. In 1941, Thomas E. Snyder

Sons Company (called "Old Snyder") was incorporated, with Benjamin as President and sole stockholder. The corporate purposes for which Great American was incorporated, so far as here material, were "To make, manufacture, design, own and sell, and otherwise use, deal in, and dispose of all kinds and types of machinery, parts and products." On September 2, 1953, its purpose clause was amended by adding, "and produce, including molasses." Effective March 1, 1954, petitioner (Great American) and Old Snyder agreed to merge under Illinois law. Under the agreement, Old Snyder was to merge into petitioner and the latter change its name to that of Old Snyder, *i.e.*, Thomas E. Snyder Sons Company. The reorganization was duly effected on March 25, 1954.

The findings of the Tax Court are based in the main upon a stipulation entered into by the parties. The only witnesses heard were Benjamin A. Snyder, called by petitioner, and Warren P. Snyder, called by the Commissioner. Thus, there is little if any dispute as to the evidentiary facts, a brief statement of which will be sufficient for our present purpose.

Petitioner (Great American) in its income tax returns for the years 1950 to 1953, both inclusive, reported a substantial net loss for each year. For each of the same years Old Snyder reported a substantial net income. Petitioner (after merger) also reported a substantial normal and surtax net income for the years 1954, 1955 and 1956, the years involved in this proceeding. Against this income, petitioner deducted operating losses sustained and reported during the pre-merger years and thus showed no taxable income. The Commissioner disallowed petitioner's net operating loss deductions and determined deficiencies in income tax for each of the years. This determination by the Commissioner was sustained by the Tax Court, 3 T.C. No. 39.

In the posture of the case before the Tax Court, the primary issue as stated by that Court was as follows:

> "The only question for decision is whether petitioner is entitled to carry over net operating losses incurred in its former farm implement business in prior years against its subsequent earnings from a different type of business not owned at the time of the losses."

Section 129 of the Internal Revenue Code of 1939 (Title 26 U.S.C.A. Sec. 129) provides:

> "If (1) any person or persons acquire, on or after October 8, 1940, directly or indirectly, control of a corporation, * * * and the principal purpose for which such acquisition was made is evasion or avoidance of Federal income or excess profits tax by securing the benefit of a deduction, credit, or other allowance which such person or corporation would not otherwise enjoy, then such deduction, credit, or other allowance shall not be allowed. * * *"

(So far as here pertinent, Sec. 269, I.R.C. 1954, contains no substantial change.)

The Tax Court found that "Benjamin acquired control of petitioner in 1953," and "The principal purpose of Benjamin for acquiring control of petitioner was to evade or avoid Federal income tax by securing to himself, as sole shareholder, the benefit of petitioner's net operating loss deductions, a benefit or deduction which he would not otherwise have enjoyed."

As we understand, petitioner raised no question before the Tax Court but that Benjamin acquired control in 1953, as found. The main contention was that Section 129 was not applicable because the acquisition of control by Benjamin was not made for the principal purpose of evasion or avoidance of Federal income tax. Petitioner before the Tax Court relied strongly upon the decision of that Court in *British Motor Car Distributors, Ltd.*, 31 T.C. 437. In that and similar cases the Tax Court had held that Sec. 129 applied only where the person acquiring control of a

corporation was the taxpayer seeking the benefit of a loss carryover, and that the section did not apply where the taxpayer, as here, was the corporation whose control was acquired. The Tax Court, however, was reversed by the Court of Appeals for the Ninth Circuit. *C.I.R.* v. *British Motor Car Distributors, Ltd.*, 278 F. 2d 392. In the instant case, the Tax Court concluded that it had been in error and agreed with the reasoning and decision of the Court of Appeals. Two other Circuits have joined the Ninth in rejecting the position previously taken by the Tax Court. *Mill Ridge Coal Co.* v. *Patterson*, 264 F. 2d 713 (C.A. 5), and *James Realty Co.* v. *United States*, 280 F. 2d 394 (C.A. 8). In the latter case (page 402) the Court discusses and approves not only these cases but also the decision of the Tax Court in the instant case.

It is not open to question but that the cited cases squarely support the decision under review, based on the findings which the Tax Court made; in fact, petitioner does not contend to the contrary. However, petitioner does urge that there is no substantial support for certain findings essential to support the decision. An important challenge is to the finding that Benjamin acquired control of petitioner in 1953. It is contended that Benjamin and his brother, Warren, acquired control in 1949 when petitioner (Great American) was organized, at which time the two brothers became the owners of more than 50% of petitioner's outstanding shares. Obviously, if this position is sound, the decision could not stand inasmuch as there is no basis for a contention that there was a purpose to evade or avoid taxes at that time.

Petitioner in support of its argument on this point relies upon Sec. 24 (b)(2)(B), which states, "An individual shall be considered as owning the stock owned, directly or indirectly, by or for his family," and Sec. 24 (b)(2)(D), which states, "The family of an individual shall include

only his brothers * * *." No case is cited and we find none in which the question has been raised and it is unfortunate that it was not first presented to the Tax Court.

Petitioner also argues that Commissioner's regulation Sec. 39.129-2 (c) supports its contention as to the applicability of Sec. 24 (b). As to this regulation, petitioner in its brief states that the "1953 transaction was not an acquisition of control within the meaning of Section 129, because under Section 24 (b) and Section 129 operating together, control had been acquired in 1949." Referring to such sections, the regulation states: "The principle of law and the particular sections of the Code are not mutually exclusive and in appropriate circumstances they may operate together or they may operate separately." It seems to us that the pertinency of the regulation depends upon the applicability of the statutory provision.

Section 24 (b) is entitled "Losses from sales or exchanges of property." Thus, the provisions of Sec. 24 (b), including those relied upon by petitioner, are limited to situations where the losses sought to be deducted are from sales or exchanges of property. The losses sought to be deducted in the instant case admittedly are net operating losses. We agree with the Commissioner that neither the statutory provision nor the regulation has any pertinency to the instant situation. We hold, therefore, that the Tax Court properly found that Benjamin acquired control of petitioner in 1953.

This brings us to the issue as to whether petitioner's attempted deduction of net operating loss carryovers was properly disallowed by the Tax Court on the ground that Benjamin Snyder acquired control of the taxpayer in 1953 for the principal purpose of avoiding Federal income taxes. We conclude that the determination of the Tax Court on this issue must be accepted. Certainly there is no reasonable basis upon which we could conclude that its finding in this respect was clearly erroneous.

Petitioner, erroneously we think, argues the case here as though the burden was upon the Commissioner to establish that the principal purpose of petitioner was to avoid taxes. The burden, however, was upon petitioner to prove to the contrary. *Helvering* v. *Taylor*, 293 U.S. 507, 515; *American Pipe and Steel Corp.* v. *Commissioner*, 243 F. 2d 125, 126.

We discern no point in relating the evidentiary situation in detail. A few salient facts will suffice. In 1953, when Old Snyder was merged into petitioner (Great American) and the latter's name changed, Old Snyder had for the past three years realized and reported a substantial net income for each year. At that time, petitioner (Great American) was insolvent, all of its assets had been disposed of, it had a huge indebtedness and its shares were practically worthless. It had for each of several years reported operating losses in substantial amounts. Between 1949 and 1953, Benjamin purchased in his own name forty-five railroad tank cars which he operated as sole proprietor and which were used principally to transport molasses dealt in by Old Snyder, the shares of which were owned entirely by him. Immediately after the merger, Benjamin transferred these tank cars to petitioner. At the same time, the purpose clause in petitioner's charter was amended to include the use of tank cars and the production of molasses, a business in which Old Snyder but not petitioner had been previously engaged. These manipulations and others shown in the record raise an inescapable inference in support of the Commissioner's determination that tax avoidance was the principal purpose.

As noted, the only oral testimony offered by petitioner was that of Benjamin, who testified that he had already invested $62,500 in petitioner's stock and that he wanted to get 100% control so that he could try to operate it profitably. Petitioner argues that this testimony as to purpose was not contradicted or impeached and that the Tax Court had no right to disbelieve it.

True, there are cases which announce the rule that a trier of facts has no right to arbitrarily reject the testimony of a witness merely because he has an interest in the subject matter of his testimony. See *Chesapeake & Ohio Ry. Co.* v. *Martin et al.*, 283 U.S. 209, 216. This rule, however, is of no benefit to petitioner. See opinion of this Court in *Hall* v. *Delaney*, 238 F. 2d 912, 914, and cases therein cited.

We have read and reread the testimony of Benjamin and it is far from convincing that his purpose was other than tax avoidance. Certainly it is no aid to petitioner's burden in showing the contrary. His testimony was indefinite, uncertain and in some respects evasive, particularly as to his purpose in acquiring control of petitioner. He admitted that he hired a firm of auditors "to organize the mechanics of this thing," and acted on their advice. He further testified that the same auditors advised him on tax matters and prepared the tax returns here involved. It is possible, although highly improbable, considering Benjamin's educational and business background, that he did not fully realize the tax consequences of his activities. Even so, we know of no reason why he should not be held responsible for the acts of his agent which he ratified by signing and filing tax returns.

Petitioner chides the government for its failure to call as witnesses persons from whom Benjamin purchased his

stock, asserting that "they would have been in a position to testify if this were a tax scheme." Reliance is then placed on the familiar rule that the failure of a party to produce a witness "raises the presumption that his testimony, if produced, would be unfavorable to the party." We think petitioner attempts to place the shoe on the wrong foot. If such persons possessed information relevant to the issue involved, why were they not called by petitioner upon whom the law cast the burden of proof? And what about the auditors whose advice in tax matters was so heavily relied upon by Benjamin? If any inference is to be indulged because of a failure to call such persons, we think it must be against petitioner and not the Commissioner.

Petitioner contends that in any event the Commissioner abused his discretion under Sec. 129 (b)(1) of the 1939 Code by not allowing the portion of the loss carryover attributable to Benjamin's original stock investment. This section authorizes the Commissioner in any case to which Sec. 129 (a) applies "to allow as a deduction, credit, or allowance any part of any amount disallowed by such subsection, if he determines that such allowance will not result in the evasion or avoidance of Federal income and excess profits tax for which the acquisition was made * * *." Petitioner points out that it has not suffered any losses at the time Benjamin made his original investment of $62,500, and that it was his later acquired stock, the acquisition of which the Tax Court found was for the purpose of tax avoidance. It is contended that absent this latter acquisition he would have been entitled to a loss carryover to the extent of his original investment. We do not think so. At any rate, without the merger, it is not discernible how

he could have utilized losses incurred by reason of his original investment in a corporation which had ceased business, was without assets and, therefore, no longer obligated to report income. Benjamin having acquired control for the principal purpose of avoiding taxes, we think the Commissioner did not abuse his authority in determining that no part of the claimed deduction was allowable.

Finally, the government contends that the deduction of the net operating loss carryovers should be disallowed under the rationale of the Supreme Court's decision in *Libson Shops, Inc.* v. *Koehler*, 353 U.S. 382, 384. In view of what we have held, we, like the Tax Court, find it unnecessary to dismiss or decide the applicability of that decision.

The decision of the Tax Court is

Affirmed.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

In the

United States Court of Appeals

For the Seventh Circuit

FRIDAY, MARCH 17, 1961

Before

HON. JOHN S. HASTINGS, Chief Judge
HON. WIN G. KNOCH, Circuit Judge
HON. J. EARL MAJOR, Circuit Judge

No.13159

THOMAS E. SNYDER SONS CO.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petition for review of a decision of the Tax Court of the United States.

This cause came on to be heard on the transcript of the record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the decision of the Tax Court of the United States entered in this cause on August 31, 1960, be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

APPENDIX C

Sec. 129. Acquisitions Made To Evade Or Avoid Income Or Excess Profits Tax. (IRC 1939)

(a) Disallowance of Deduction, Credit, or Allowance.—If (1) any person or persons acquire, on or after October 8, 1940, directly or indirectly, control of a corporation, or (2) any corporation acquires, on or after October 8, 1940, directly or indirectly, property of another corporation, not controlled, directly or indirectly, immediately prior to such acquisition, by such acquiring corporation or its stockholders, the basis of which property, in the hands of the acquiring corporation, is determined by reference to the basis in the hands of the transferor corporation, and the principal purpose for which such acquisition was made is evasion or avoidance of Federal income or excess profits tax by securing the benefit of a deduction, credit, or other allowance which such person or corporation would not otherwise enjoy, then such deduction, credit, or other allowance shall not be allowed. For the purposes of clauses (1) and (2), control means the ownership of stock possessing at least 50 per centum of the total combined voting power of all classes of stock entitled to vote or at least 50 per centum of the total value of shares of all classes of stock of the corporation.

(b) Power of Commissioner to Allow Deduction, Etc., in Part.—In any case to which subsection (a) is applicable the Commissioner is authorized—

(1) to allow as a deduction, credit, or allowance any part of any amount disallowed by such subsection, if he determines that such allowance will not result in the evasion or avoidance of Federal income and excess profits tax for which the acquisition was made; or

(2) to distribute, apportion, or allocate gross income, and distribute, apportion, or allocate the deductions, credits, or allowances the benefit of which was sought to be secured, between or among the corporations, or properties, or parts thereof, involved, and to allow such deductions, credits, or allowances so distributed, apportioned, or allocated, but to give effect to such allowance only to such extent as he determines will not result in the evasion or avoidance of Federal income and excess profits tax for which the acquisition was made; or

(3) to exercise his powers in part under paragraph (1) and in part under paragraph (2).

(Section 269 of the Internal Revenue Code of 1954 is substantially identical with the above)